

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK WILLIAMS	:	
	:	CIVIL ACTION
	:	NO. 99-2756
v.	:	
	:	(CRIMINAL NO. 94-462-1)
UNITED STATES OF AMERICA	:	

MEMORANDUM ORDER

This is a petition to vacate, set aside or correct a sentence pursuant to 28 U.S.C. § 2255. Petitioner was convicted of various narcotics and firearms offenses. Even aside from petitioner's career offender status, he had 16 criminal history points which placed him in Category VI. He also subject to a statutorily mandated consecutive sentence pursuant to 18 U.S.C. § 924(c)(1)(A)(i) & (D)(ii). Petitioner was sentenced on December 6, 1996 to imprisonment for 270 months to be followed by five years of supervised release. The conviction and sentence were affirmed on July 6, 1997.

Petitioner has submitted a lengthy petition plus three amendments with an array of claims, some of which are redundant.

Petitioner asserts that his initial attorney was ineffective in failing to interview petitioner's wife after petitioner related that she could be "an alibi witness" because counsel "believed it would be useless" and in urging petitioner to accept a plea agreement, stating that "we don't have much of a case to work with." The evidence against petitioner was overwhelming. The charges against petitioner resulted from

personal confrontations with police officers who seized from his person and a vehicle he was then operating numerous packets of crack cocaine and two loaded handguns. Counsel would not be ineffective for reasoning that any alibi testimony in such circumstances would be useless, if not ludicrous, and in urging acceptance of a plea agreement which resulted in the dismissal of a charge carrying a mandatory consecutive penalty of 20 years of imprisonment. Also, petitioner reaffirmed his plea on the record at court proceedings after appointment of new counsel.

Petitioner claims that his initial counsel acted unethically in having "a intimate and sexual relationship with [petitioner's] wife." While such behavior would be highly inappropriate, petitioner has not shown that it prejudiced the actual conduct of his case which was assumed by substitute counsel.

Petitioner asserts that the adoption of his case by the United States Attorney following his arrest by state authorities as part of the so-called FAST program violated the Tenth Amendment and principles of federalism. Petitioner's conduct violated both state and federal laws, and he was constitutionally subject to prosecution by either or each sovereignty.

Petitioner asserts that he was subjected to "selective prosecution" as he was "targeted" by federal authorities "because [he] had prior felony convictions" and because the FAST program

focuses on drug and firearm offenders to the exclusion of some other felons. Petitioner had at least five prior convictions and was not unfairly characterized in his PSR as "a violent individual who has an atrocious criminal record." A decision to prioritize petitioner's case for federal prosecution because of his criminal record or illegal involvement with firearms and drugs would not be unconstitutional.

Petitioner asserts that the government did not present proof that the cocaine base he possessed was "crack." Petitioner, however, acknowledged under oath at his plea hearing that the substance in question was crack cocaine.

Petitioner asserts that because he was not a firearms importer, manufacturer or dealer, the criminalization of his possession of firearms exceeds the authority of Congress under the Commerce Clause. As petitioner acknowledges, the BATF established that the firearms found in his possession in Philadelphia had been previously manufactured in Massachusetts and Brazil respectively. The power of Congress to regulate the possession of such firearms by convicted felons or for use in crime has long been upheld.

Petitioner proffers various reasons why it was improper to increase his criminal history category and thus his sentencing range based on his prior state convictions.

He asserts that the Sentencing Commission exceeded its statutory authority in making prior state convictions a basis for career offender status. It clearly did not. He asserts that his prior convictions should not have been considered for sentencing purposes because they were not "part of a pattern of criminal conduct." There is no constitutional or legal requirement that they be such. Also, insofar as a "pattern" is conventionally defined as "frequent incidence" or "a reliable sample of traits, acts, tendencies or characteristics of a person," it would not be inaccurate to characterize petitioner's criminal conduct as a pattern.

Petitioner asserts that use of his prior convictions to enhance his sentence violated the double jeopardy clause. The consideration of a defendant's criminal history in determining a sentence within the statutory penalties for a current offense does not violate the proscription against double jeopardy.

Petitioner asserts that consideration of one of his prior convictions for robbery violated the ex post facto clause because it occurred before the federal sentencing guidelines took effect. He is mistaken. The date of the pertinent conviction is March 8, 1988. The federal sentencing guidelines were promulgated pursuant to the Sentencing Reform Act of October 12, 1984 and took effect on November 1, 1987. Moreover, what is pertinent is that the guidelines were long in effect at the time petitioner

committed the offenses resulting in the conviction underlying his petition.

Petitioner asserts that certain prior state convictions should not have been used in calculating his criminal history because his sentences had been served before his federal conviction and he had not been warned that those state convictions could result in an enhanced federal sentence should he be convicted thereafter of a federal offense. The guidelines do not limit the prior convictions to be used in calculating a defendant's criminal history category to those for which he was serving a sentence at the time of his federal offense of conviction. Petitioner was on notice from the effective date of the guidelines in 1987 that should he thereafter commit the federal drug and firearms offenses for which he was indicted in 1994, any resulting sentence would be based in part on a criminal history score derived from previous convictions.

Petitioner asserts that the federal sentencing guidelines and minimum mandatory sentencing statutes deprived him of "the right to be sentenced by a judge with free discretion to exercise an appropriate sentence according to his expertise and experience" which denied petitioner due process of law. The short answer is that the United States Supreme Court has upheld the constitutionality of the guidelines and if Congress has the

power to enact maximum penalties, it has the power to provide minimum penalties.

Petitioner asserts that because his prior convictions increased his sentencing exposure, they should have been charged as "elements" of the federal offenses and proved beyond a reasonable doubt. He does not aver that the certified copies of those convictions are not accurate, and this claim is otherwise meritless.

Petitioner asserts that his substituted attorney was ineffective in failing to raise on appeal meritorious issues suggested to him by petitioner. Petitioner has identified no such issue.

Moreover, all but one of petitioner's claims were clearly known and assertable by him by July 1997. As his petition was filed two years later, these claims are barred by the one year limitation period in § 2255.

The one exception is the claim that the fact of his prior convictions should have been charged and proved as elements of the pertinent offenses. The limitation period for this claim arguably runs from the date of the Supreme Court decision in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), pursuant to subparagraph (3) of the sixth paragraph of § 2255. This claim, however, is meritless. Petitioner's prior convictions did not result in a sentence greater than the statutory maximum penalties

for the offenses charged and the Supreme Court in any event excluded the fact of prior convictions from the scope of Appendi. The Court held that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [Emphasis added].

ACCORDINGLY, this day of September, 2000, **IT IS HEREBY ORDERED** that petitioner's petition to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 is **DENIED** and the above action is **DISMISSED**. A certificate of appealability is not issued pursuant to 28 U.S.C. § 2253 (c)(1)(B).

BY THE COURT:

JAY C. WALDMAN, J.